IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DOCKET NO. 91

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DOCKET NO. 934

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

We respectfully draw the Court's attention to the decision just published of the United States Court of Appeals for the Sixth Circuit, in *Local Union 998, U.A.W.* v. *B & T Metals Company*, —— F. 2d ——, 47 CCH Lab. Cas. ¶ 18,191 (filed April 5, 1963). The decision is of particular interest not only because it supports petitioner's contention that under the pertinent decisions of this Court the issue of whether Wiley is contractually obligated to arbitrate must be determined by the court and not the arbitrator (Second Reason for Allowance of Writ (p. 9) and subheading "Substantive Arbitrability" under Point 2 of Argument (pp. 12 and 13)), but also because it establishes a clear conflict in principle on this point with the decision of the Second Circuit in the case at bar.

In the cited case, the issue for determination was whether the contract was in existence when the grievances which the Union sought to arbitrate arose. The District Court directed the arbitrator to determine the issue.

The Court of Appeals reversed.* It held that the basic question of arbitrability, that is, whether there was a subsisting agreement requiring arbitration, must be determined by the court and not by the arbitrator.

In the case at bar, the basic threshold issue is whether Wiley was obligated under Interscience's contract with the Union to arbitrate the asserted grievances. The Court of Appeals refused to pass on the issue and directed that it be determined by the arbitrator.

The majority opinion requires Wiley to proceed to arbitration to determine "whether the obligation to arbitrate • • • survived the consolidation" (p. A-17, Appendix). Judge Kaufman, concurring in order to "clarify" the holding of the court stated that "although the collective bargaining agreement contains no express provision making its obligations binding upon the successors of the parties, our decision today, in effect, permits the arbitrator to 'imply' such a provision into the agreement if, under the circumstances present here such an implication is proper" (p. A-35, Appendix). See page 8 of Petition.

We think words cannot more clearly express a direction to the arbitrator to determine the issue of whether or not Wiley is contractually bound to arbitrate. We submit that this is not only in direct conflict with the decision of the

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* The Court of Appeals assumed, as contended by the union, that the factual issue was not resolved by the District Judge and that his ruling was based on the conclusion that, as a matter of law, the issue was to be determined by the arbitrator and not by the Court.

Sixth Circuit, but is also squarely contrary to the rule laid down by this court in the *Steelworkers* cases and in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962).*

Respectfully submitted,

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* Note that a related but distinct question upon which certiorari is also sought and as to which the Circuits have so sharply divided is whether so-called "procedural arbitrability" is within the rule of *Atkinson* v. *Sinclair Refining Co.* that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court." (First Reason for Allowance of Writ (p. 9) and Point 1 (pp. 10-12) and subheading "Procedural Arbitrability" under Point 2 (p. 13) of Argument.)